

Response to the Call for written evidence: Data Protection [Lords] Bill

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Executive Summary

1. In our view, clause 168 (and in consequence, clause 169) of the Data Protection [Lords] Bill ("the Bill") should not be included in the Bill because:
 - a. their enactment would have severe, adverse, consequences on publishers who are Small to Medium Enterprises - see paragraphs 18-30;
 - b. their enactment would have a chilling effect on freedom of expression - see paragraphs 31-36;
 - c. their enactment would be likely to encourage vexatious and unmeritorious litigation - see paragraphs 37-51;
 - d. their enactment would be likely to be incompatible with the fundamental obligations imposed on litigants by the Civil Procedure Rules - see paragraphs 52-54;
 - e. their enactment would be likely to generate significant satellite litigation, because the exceptions to the proposed general costs rule are unclear and imprecise, and thus will create significant injustice - see paragraphs 55-69;
 - f. their enactment, in the context of the current 'no win, no fee regime', would encourage, not discourage, litigation - see paragraphs 70-73; and
 - g. their enactment would be likely to contribute to the UK's declining press freedom ranking, as assessed by Reporters Without Frontiers - see paragraphs 80-83
2. Although clauses 168 and 169 were removed from the Bill during its Committee stage, the possibility of their possible reinstatement to the Bill at a later Parliamentary stage means that the forgoing, and the contributions to the debate by several MPs, are still relevant - see paragraphs 74-79.

A. Foot Anstey's Editorial & Regulatory Media Team

1. There are approximately 80 regional daily and Sunday paid-for newspapers in the UK, and some 1,000 paid-for and free weekly papers. In addition, the major newspaper publishers maintain news-based websites which have significant readerships.
2. Foot Anstey's Editorial & Regulatory Media Team represents the majority of regional and local newspapers (and associated websites) in England, Wales, and Northern Ireland, and has done so for more the last 28 years or so.
3. We also represent three national newspaper titles (and websites), a national newspaper publisher's news website, regional and national magazine publishing groups, several L-DTPS broadcasters, a number of specialist religious publications, and a number of purely online publishers.
4. We primarily advise our clients in two respects: by providing pre-publication/broadcast advice, and advising in respect of post-publication complaints and disputes.
5. In short, we have the largest media law practice in England and Wales (and indeed in the UK) outside London. Moreover, on some measures, our practice is larger than the majority of our London-based competitors.
6. Foot Anstey is recognised as one of the leading media law firms nationwide, and the market leader in advising the local and regional press, e.g. Chambers Directory 2018:

https://www.chambersandpartners.com/11805/20/editorial/1/1#13_editorial

It will be seen that Chambers also recognises that the author of this paper, Tony Jaffa, is a leading practitioner in this field.

7. Because we act for so many local and regional newspapers and websites throughout the UK, we believe that we are able to speak with some authority on how potentially damaging the enactment of clause 168 of the Bill could be to the UK news industry. In view of our experience, we believe that we have a particular and unique understanding of the needs of, and pressures on, the national, regional, and local press.

B. Background legal position re clause 168

8. All but one of our newspaper publishing clients are members of the Independent Press Standards Organisation (IPSO), and for the purposes of self-regulation, they abide by IPSO's Editors' Code of Practice¹.
9. The newspaper and online publisher client which is not a member of IPSO has decided that it prefers self-regulation in the truest sense of the expression, having created its own complaints handling procedure. We know, however, that as a matter of practicality, this particular publisher abides by the Editors' Code.
10. The Royal Charter on Self Regulation of the Press² was granted on 30th October 2013.
11. It is well known that IPSO has not sought, and will not seek, recognition as an approved regulator under the Charter. The reasons for not seeking recognition are in the public domain and need not be recited here.
12. Meanwhile, the Press Recognition Panel, established under the Royal Charter, recognised The Independent Monitor of the Press CIC (IMPRESS) within the meaning of the Charter, on 25th October 2016³.
13. In consequence of IMPRESS' recognition under the Charter, were clause 168 of the Bill to be enacted, it would have immediate effect.
14. It is not for us to comment on the decision of all of our clients not to become members of an approved regulator, and we do not do so. We accept that our clients have made their decision in this respect for legitimate and reasonable reasons, and we proceed from that position.
15. Were clause 168 of the Bill to be enacted, IPSO's decision not to seek recognition under the Royal Charter will preclude its members from relying on the provisions of clause 168(2) in any data protection litigation. Similarly, our publisher client which is neither a member of IPSO nor of IMPRESS will also be precluded from being able to rely on clause 168(2).
16. Accordingly, for all our news publishing clients, the key consideration is the effect of clause 168(3) might have on their operations.
17. As clause 168(3) of the Bill makes clear, the Court must award costs against a Defendant publisher which is not a member of an approved regulator in data protection litigation irrespective of the outcome, unless an exception applies:
 - i. clause 168(3)(a) - the matter could not have been resolved by way of an arbitration scheme of an approved regulator (had the Defendant been a member of that regulator);
 - ii. clause 168(3)(b) - it is just and equitable in all the circumstances to make a different award of costs, or to make no costs order at all.

The "arbitration exception" is discussed at paragraphs 56-62 below. The "just and equitable exception" is discussed at paragraphs 63-69 below.

¹ http://www.editorscode.org.uk/the_code_2016.php

² [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254116/Final Royal Charter 25 October 2013 clean Final .pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254116/Final_Royal_Charter_25_October_2013_clean_Final.pdf)

³ <http://pressrecognitionpanel.org.uk/wp-content/uploads/2016/07/IMPRESS-decision-report-21-November-2016.pdf>

C. Our overview of the current state of the news publishing industry

18. We hope it is helpful to give our overview of the current state of the news publishing industry and of our publishing clients (national, local, and regional newspapers and websites).
19. Our client publishers fall broadly into three groups:
 - i. a small number of independent, usually family owned, publishers;
 - ii. a larger category of publishers which are privately owned, often by a small group of shareholders;
 - iii. a small group of large publishers which are either PLCs in their own right, or are owned by PLCs and/or institutional investors, and/or foreign publishers.
20. Publishers which fall into groups i. and ii. may be categorised as Small to Medium Sized Enterprises (“SMEs”). In the UK, a company is defined⁴ as being an SME if it meets two of the following three criteria:
 - i. it has a turnover of less than £25m;
 - ii. it has fewer than 250 employees;
 - iii. it has gross assets of less than £12.5m.

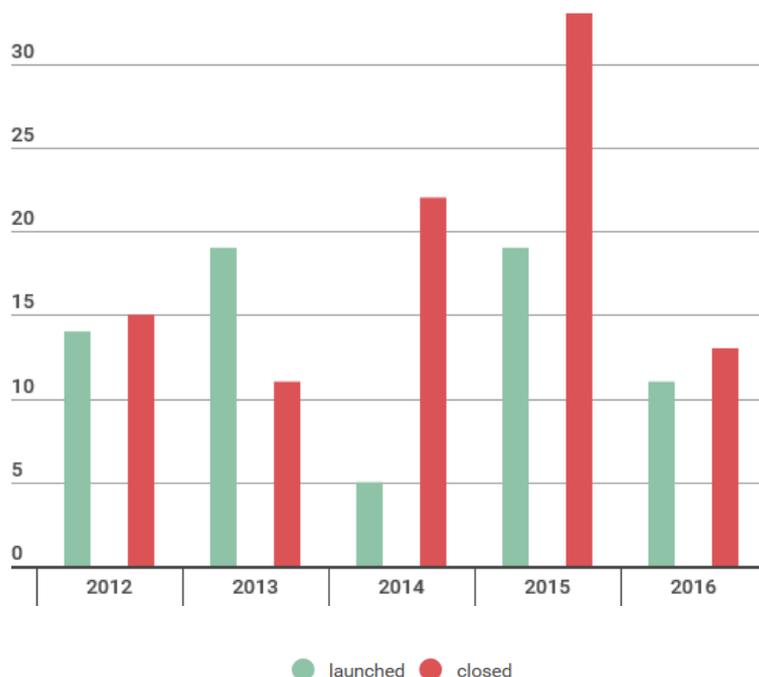
These types of publishers are all generally profitable, but not hugely so.

21. Some of the publishers in group iii., particularly web publishers, may be categorised as SMEs, but not all. Again, these publishing companies are generally profitable, though in some cases, only to a small extent.
22. It is also important to note the ever-increasing financial pressure to which news publishers have been subjected since the mid-2000s. The migration of advertising to the internet and the consequent decline in advertising revenue, the decline in print readership, the consequent need for costs reductions, the reduction in the number of journalists employed, the need for consolidation of the market, and increases in the cost of print-related raw materials (paper and ink), are all well documented and do not need to be repeated in this submission.
23. The point of mentioning these issues is that they cannot be ignored when considering the adverse effect of litigation generally on publishers, and of litigation costs in particular. Together, they make up the context of understanding the consequences of clause 168(3) on news publishers, were it to be enacted and neither of the exceptions applied.
24. One common factor that all our client publishers share is that each publication, whether a stand-alone legal entity or simply a trading division of a larger company, is treated as a business entity in its own right. This means that each title stands or falls by its own financial performance. Like all businesses, if a newspaper or website is a loss maker, it will not survive, irrespective of the size and profitability of its parent.

⁴ Department for Business Innovation & Skills 30.06.12 - <https://www.gov.uk/government/collections/mid-sized-businesses>

25. For confirmation, one only has to look at the fact that 46 local and regional newspapers closed in the year 2015/16, and after taking into account the launch of 29 newspapers, there was a net loss of 17 in that 12 month period alone⁵.
26. According to research reported by Press Gazette⁶, the net loss of local newspapers since 2005 is 198.
27. The following graph illustrates the trend since 2012 in a more visual way⁷:

Launches and closures of local newspapers



28. This trend has continued, with (anecdotally) some 20 newspapers closing since the beginning of 2017.
29. It is our view, therefore, that every local and regional newspaper is, in practice, an SME (frequently, a relatively small SME) with limited financial resources.
30. Therefore, when assessing a title's financial situation, we believe it is a fallacy to have regard both to the fact that a title and/or website is a subsidiary of a larger parent company, and to the parent's financial standing.

⁵ Press Gazette 19.12.16 - <http://www.pressgazette.co.uk/new-research-some-198-uk-local-newspapers-have-closed-since-2005>

⁶ Ibid

⁷ Ibid

D. Litigation, Litigation Costs, Litigants-in-Person, and the Overriding Objective

31. Since the implementation of the Defamation Act 2013, we have noticed a marked reduction in the number of libel claims threatened and/or brought against our clients based in England and Wales (the Act has not been implemented in N. Ireland). The reason, we believe, is that the obligation imposed on potential Claimants to meet the new, higher, threshold of "serious harm", or of "the risk of serious harm" to a reputation, is having the deterrent effect that Parliament intended.
32. Lawyers who generally represent claimants have freely admitted that in consequence, they now tend to look to data protection law as an easier way to seek compensation for their clients for perceived publishing wrongs, in place of libel. Simultaneously, at least one high profile QC has argued that the protection granted to publishers by S.32 of the Data Protection Act 1998 is, in fact, much narrower than is generally thought⁸.
33. In this context, we believe that the enactment of clause 168(3) of the Bill would likely be extremely damaging both to the UK news industry, and to the ability of our fellow citizens to access national and local news and information. In short, we believe the enactment of clause 168(3) would be contrary to the public interest.
34. Whatever their background, market, size, history, and competitive rivalries, our clients all have the same views of litigation costs, namely that the risk of incurring an adverse costs order:
 - i. has a serious chilling effect on their right, and the right of the public, to freedom of expression (Article 10 rights), in terms of publishers not publishing investigative or contentious articles which carry a risk of provoking litigation; of publishers settling claims which they would otherwise defend on their merits, due to the fear of adverse, and high, costs orders being incurred; and of the public not receiving information to which they are entitled; and
 - ii. constitutes a restriction on their right to "*a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*" (Article 6 rights).
35. Irrespective of the formal legal position, however, our clients continually tell us that the fear of adverse costs orders often persuades them not to publish material which runs the risk of provoking litigation; and if sued, to settle claims irrespective of the merits (assuming such claims have not been struck out at an early stage).
36. In short, the risk of incurring adverse costs is simply too high for the vast majority of our clients. Indeed, for the reasons cited in section C above, the very existence of a publication may well be at risk if an adverse costs order is made against its publisher. It is absolutely the case that every time we advise a publisher on whether to defend a claim, the bulk of the advice concerns costs, the risk of an adverse costs order being made, and the ability (or otherwise) of a Claimant to satisfy any costs order that may be made in the publisher's favour.
37. One of the real problems faced by publishers concerns utterly unmeritorious High Court claims commenced by those who have grievances which have no basis in law. Such claims

⁸ <https://inform.org/2017/03/28/the-journalism-exemption-in-the-data-protection-act-part-1-the-law-hugh-tomlinson-qc/#more-36965>, by Hugh Tomlinson QC.

are usually (though not always) brought by litigants-in-person, who are invariably impecunious.

38. In the last 24 months, we have represented publishers in 10 different actions, who were sued by nine 'vexatious' Claimants, all of whom brought spurious claims which were entirely without merit. Most were based on libel but some also included other causes of action, including alleged breaches of the Data Protection Act.
39. Of the nine claimants, five had been, until recently, subject to extended civil restraint orders or general civil restraint orders which had prevented them from commencing litigation in certain circumstances without the permission of supervising High Court judges. Until just prior to the commencement of the proceedings, therefore, they had been vexatious litigants in the strict legal sense.
40. We had very strong evidence which indicated that one of the remaining claimants was acting as a proxy for one of the five individuals mentioned above (a person who is currently in prison for fraud).
41. In the context of the practicalities of litigation costs, it is pertinent to recite the most recent example of a litigant-in-person abusing the legal system.
 - a. A former teacher was 'struck off' by his disciplinary body for inappropriate behaviour with at least one female student. Our client, a reasonably large local newspaper and web publisher, reported the outcomes of the initial disciplinary hearing and the subsequent appeal to the High Court. The articles were fair, accurate, and contemporaneous, so both were protected by privilege.
 - b. Nevertheless, the former teacher issued two separate libel actions in the High Court, both of which were struck out on the grounds that they were an abuse of process and had no reasonable prospect of success. Our client was also awarded costs, which were assessed by the Court at approximately £25,000.
 - c. Our client has been endeavouring to enforce the costs orders, but the former teacher has simultaneously been evading the enforcement officers and making spurious applications to the Court for relief, all of which have been dismissed (with costs).
 - d. The total due to our client now stands at £32,000. It is still unknown whether our client will ever make any recovery.

The upshot is that although our client did nothing wrong in reporting the two hearings, it has been compelled to incur significant legal costs for merely performing its duty to inform the public of matters of significant local public interest. The injustice suffered by our client is self-evident.

42. Although the example cited in paragraph 41 is not on all fours with the situation which would exist were clause 168(3) of the Bill enacted, it nevertheless provides a practical illustration of the injustices that innocent publishers currently suffer when claimants misuse their right to access to justice. It takes no great leap of imagination to see how clause 168(3) would cause similar injustice in a data protection case. Plainly, enactment of the clause will only exacerbate these injustices.

43. Returning to the above mentioned cases, in each one, an application to strike-out the claim had to be prepared and submitted. In most of them, it was felt necessary for counsel to be retained to make representations on our client's behalf at the strike-out hearing.
44. The approximate costs of seven of the claims (final details of the remaining cases are not yet available) incurred by our clients were as follows:

	Solicitors' Fees (excluding VAT)	Counsel's Fees (excluding VAT)	Disbursements (excluding VAT)	Total (excluding VAT)
1	£14,000	£1,000	£500	£15,500
2	£3,800	n/a	£400	£4,200
3	£8,600	n/a	£400	£9,000
4	£9,570	£1,450	£650	£11,670
5	£11,020	£2,425	£475	£13,920
6	£9,745	£10,900	£1,050	£21,695
7	£10,730	£2,150	£500	£13,380

45. Equally importantly, every one of the seven cases resulted in the Claimant's claim being dismissed, with orders for costs being made in favour of our clients; and in not one of them were the publishers able to recover even the smallest of contributions to their costs. (In one case, the Claimant offered to pay the debt at a rate which would have taken 60 years to discharge. Unsurprisingly, the offer was not accepted as the cost of administration would have far exceeded the value of the debt itself).
46. Thus, having done nothing wrong, the publishers were nevertheless compelled to engage with each of the litigants and their claims, and incur significant costs. To add insult to injury, having been vindicated by the Courts, they were still left significantly out of pocket.
47. We recognise that the seven cases are but a snapshot of our recent experience. However, they are entirely typical of, and consistent with, the kinds of cases we have handled for our clients for the last 28 years or so. What is unique is that the cases all came to a head at more or less the same time.
48. It is in light of these experiences that we believe that enactment of clause 168 of the Bill would create a real risk of there being a significant surge in data protection based litigation. Why would a prospective Claimant think twice before issuing proceedings when, irrespective of the outcome, s/he assumes absolutely no financial risk in doing so?
49. But the most critical issue is this: had clause 168(3) been in force at the time these cases were decided, and had they been pure data protection cases, the Court's starting premise would have been that our clients would also have had to pay the Claimants' costs, unless each publisher could persuade the Court that one of the exceptions applied.
50. No doubt there would be some data cases where the Court will apply one or other of the exceptions. But even if the Court agreed that an exception applies, the innocent publisher

would still have to incur the costs of making that application and will not, in all probability, be able to recover those costs from the unsuccessful Claimant. The injustice is obvious.

51. We believe that the consequence of the enactment of clause 168 would be that the merits of a potential claim (or absence thereof), and the disciplines imposed by the current costs regime, will become entirely irrelevant to a Claimant's thinking. With nothing to fear financially, there will be absolutely no incentive for a prospective Claimant to refrain from litigating.
52. It is worth considering this conclusion in the context of the Overriding Objective, as contained in Part 1 of the Civil Procedure Rules, and the Practice Direction regarding pre-action conduct.
 - i. Part 1 of the Civil Procedure Rules imposes the following obligations⁹:

Rule 1.1

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate-

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

Rule 1.2 requires the Court to seek to give effect to the Overriding Objective, and Rule 1.3 requires the parties to help the Court to further the Overriding Objective.

- ii. No Pre-Action Protocol exists for data protection cases, and so the "Practice Direction - Pre-Action Conduct and Protocols"¹⁰ applies.

The Practice Direction begins by stating as follows:

⁹ <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01>

¹⁰ https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct#3.1

Objectives of pre-action conduct and protocols

3. *Before commencing proceedings, the court will expect the parties to have exchanged sufficient information to -*

(a) understand each other's position;

(b) make decisions about how to proceed;

(c) try to settle the issues without proceedings;

(d) consider a form of Alternative Dispute Resolution (ADR) to assist with settlement;

(e) support the efficient management of those proceedings; and

(f) reduce the costs of resolving the dispute.

The Practice Direction then imposes a series of detailed pre-action obligations on the prospective parties to litigation.

The Practice Direction concludes with this admonition:

Compliance with this Practice Direction and the Protocols

13. If a dispute proceeds to litigation, the court will expect the parties to have complied with a relevant pre-action protocol or this Practice Direction.

There then follows a fairly detailed narrative of the steps the Court may take in the event of non-compliance.

53. In the light both of our experience and of our conclusions about the consequences of the enactment of clause 168, we find it impossible to see how clause 168 can satisfy the obligations imposed by the Overriding Objective or the Practice Direction.
54. Moreover, we believe that the enactment of clause 168 of the Bill will remove all incentives for a Claimant to consider early settlement of a data protection claim, or indeed even to consider settling a matter prior to issuing proceedings. On the contrary, our view is that if enacted, clause 168 will only encourage a Claimant to dig his heels in, and see a matter through to the bitter end because s/he has absolutely nothing to lose by doing so.

E. Clause 168(3) and the exceptions

55. As already stated, if enacted, clause 168(3) of the Bill would oblige the Court to award costs against a Defendant publisher which is not a member of an approved regulator in data protection related litigation irrespective of the outcome, unless:
- i. 168(3)(a) - the issues raised by the claim could not have been resolved by using an arbitration scheme of the approved regulator (had the defendant been a member); or
 - ii. 168(3)(b) - it is just and equitable in all the circumstances to make a different award of costs, or to make no costs order.

168(3)(a) - the "arbitration exception"

56. Our concern about the arbitration exception is that its meaning is ambiguous and unclear, and in consequence, it may transpire to be no exception to the basic costs rule contained in clause 168 at all.
57. Specifically, what does the phrase "*.....could not have been resolved by way of an arbitration scheme.....*" mean?
58. For example, does the phrase mean that the exception only applies if the matter in issue falls outside the remit of an approved arbitration scheme? Or does it mean, for example, that the exception applies when no arbitration takes place because one of the parties simply does not agree that the matter should be referred to arbitration? No doubt the phrase is open to yet further interpretations.
59. This ambiguity over the meaning of the exception is problematic because not only does it put the parties in a position of great uncertainty, but it leaves the way open for more, expensive, satellite litigation - which is ironic given that its ostensible purpose is to avoid litigation.
60. Moreover, a Defendant who contemplates relying on the arbitration exception has no way of predicting with any degree of certainty whether it will be able to do so until the very end of the case. Our view is that the inherent risk of this exception is so high that it is unlikely to be a risk that the majority of publishers would be prepared to take.
61. Accordingly, we believe that this exception is likely to prove illusory in practice, which means that clause 168(3) creates a significant chilling effect on freedom of expression.
62. More generally, the restriction contained in clause 168(3)(a), that the exception applies only to "*an arbitration scheme of the approved regulator*" (i.e. currently the arbitration scheme run by IMPRESS), is out of date and fails to take into account the low costs arbitration scheme recently introduced by IPSO.

168(3)(b) - the "just and equitable exception"

63. We recognise that the "just and equitable" exception to the basic costs rule contained in clause 168(3)(b) will provide protection to publishers in the most egregious claims.
64. For example, one would hope that upon striking out an unmeritorious claim run by a convicted criminal from a prison cell, the Court would decline to make an order that his nominal costs should be paid by the publisher, on the ground that it would not be just and equitable to do so.

65. However, the problem with the phrase "just and equitable" is that it is a phrase which is open to very different interpretations. The opportunity for satellite litigation as to its meaning is obvious.
66. Again by way of example, and to repeat the point made above, our concern is that had clause 168 been in force at the time the seven cases were decided, it is by no means clear whether the Court would have determined that it was just and equitable not to make orders for costs against our clients in most of them, despite the meritless nature of the claims, the conduct of the Claimants, and the fact that our clients were vindicated in all of them.
67. The same difficulty arises in respect of the "just and equitable" exception as is explained in paragraph 58 above regarding the arbitration exception: a Defendant who contemplates relying on this exception has no way of predicting whether it will be able to do so until the very end of the case. Our view is that this exception, too, carries an inherent risk which is so high that it is unlikely that the majority of publishers would be prepared to take it.
68. At the risk of repeating the point already made, we believe that this exception is likely to prove illusory in practice, which means that if enacted, clause 168(3) would create a significant chilling effect on freedom of expression.
69. Moreover, as a matter of policy, we do not believe that legislation which is known in advance to be ambiguously worded and likely to provoke satellite litigation, should be enacted.

F. Clause 168 and Conditional Fee Agreements

70. No discussion about costs in publication litigation would be complete without reference being made to Conditional Fee Agreements (otherwise known as "no win, no fee" agreements) ("CFAs").
71. Briefly, the current position is that in publication cases, a Claimant may enter into a CFA with a lawyer, under which:
 - i. the Claimant's lawyer's fees will only be paid via orders for costs made in favour of the Claimant against the Defendant;
 - ii. the CFA may specify that the lawyer's base hourly rates may be increased by up to 100% to reflect the element of risk assumed by the lawyer (the so-called success fee);
 - iii. if the Claimant acquires an After the Event insurance policy to give protection should an order for costs be made against the Claimant, liability for the premium is conditional on the claim succeeding and is then only payable by the Defendant.
72. The effect of the current CFA regime is that it transfers the costs risk (or perhaps more accurately, the risk of non-payment) from the client to the lawyer. One consequence, defendants argue, is that the regime promotes, not discourages, litigation because only by pursuing litigation can the lawyer be sure of being paid.
73. Our concern is that the combination of enacting clause 168 of the Bill with the existing system of CFAs will only exacerbate that thought process, and so encourage lawyers to initiate and prolong litigation, because they can be confident that whatever the outcome, they will be paid by the defendant.

G. Recent developments - House of Commons Committee Stage

74. On 20th March 2018, the Bill completed the Committee Stage in the House of Commons, with the House voting to remove clauses 168 and 169 from the Bill. However, it is reported¹¹ that attempts may be made to reinstate the clauses into the Bill at the Report Stage or possibly when the Bill returns to the House of Lords.
75. In the same article, it will be seen that the contribution of Mr. Matt Warman MP to the debate was reported:

Former journalist Matt Warman, Conservative MP for Boston and Skegness, told the committee that Section 40 sought to “punish the victim”.

“That would obviously have a clear chilling effect not only on our local newspapers, which are often on the brink of bankruptcy, but on the broader media,” he said.

“We can look at fantastic pieces of journalism even today, such as the one about Cambridge Analytica.

“The Guardian itself says: ‘Please, we would like your donations so we can keep our valuable journalism free’- the paper has had to fight off three pieces of legal action by Cambridge Analytica and one from Facebook.”

Warman added: “If every single investigative journalist was constantly living under the threat of their piece of work costing the newspaper and their boss tens of thousands of pounds, they simply would not get hired, never mind allowed into print.”

Mr. Warman's analysis is self-explanatory, and it is one with which we agree.

76. The same article also reported part of the speech of Mr. Peter Heaton-Jones MP:

Former journalist Peter Heaton-Jones, Conservative MP for North Devon, told the committee that although there was still malpractice in the newspaper industry, holding the second stage of the Leveson Inquiry would not solve the problem as it would not be “some sort of cleansing disinfectant”.

Clauses 168 and 169, inserted by the House of Lords, also had to be defeated, as they sought to enact Section 40 of the 2013 Act, he said.

“Quite simply, that will encourage a lot of entirely superfluous and vexatious legal actions to be brought by people who just have some kind of beef against the media and pockets bulging with cash that allows them to do so,” he said.

“When, as will inevitably happen, the media wins the case, because it was built on sand, the media organisations concerned will be put out of business by the requirement to pay the legal costs on both sides.”

¹¹ Press Gazette 21.03.18 <http://www.pressgazette.co.uk/government-wins-fight-to-overturn-data-protection-bill-cost-provisions-but-battle-not-yet-over/>

He went on: “Section 40 will have precisely the opposite effect to what probably anyone listening would hope it to have.

“It will be an extraordinarily damaging measure for the future of the freedom of the press in this country.

“It will have the effect of preventing publication of material which is in the public interest and which is true, legitimate, and fair, because newspaper proprietors will not be able to afford the risk of going to a court case which they win but still have to pay the costs.

“It will be an incredible impediment to the free press in this country.”

For that reason more than any other it was necessary for the committee to reject the Lords’ amendments, he said.

77. Although Mr. Heaton-Jones referred to S.40 of the Crime and Courts Act 2013, his comments apply equally to clause 168 of the Bill, because the latter mirrors the former.
78. As will be self-evident, we support the thrust of Mr. Heaton-Jones' analysis. He is absolutely right to highlight the threat to the existence of certain publishers created by the prospect of liability to pay two sets of legal costs.
79. However, whilst Mr. Heaton-Jones is correct to highlight the threat posed by vexatious litigation brought by *“people who just have some kind of beef against the media and pockets bulging with cash that allows them to do so”*, we respectfully submit that he could have gone further, by also referring to:
 - i. people, usually litigants in person, who have a beef against the media and, having no assets, have nothing to lose by bringing the most hopeless of cases because they know that any orders for costs that may be made against them are utterly worthless;and
 - ii. people who have a beef against the media and, having entered into a 'no win, no fee' agreement with their lawyers, have nothing to lose by bringing cases because they know that any orders for costs that may be made against them are of no personal consequence because either they have no assets, or they have purchased insurance which provides costs protection.

H. World Press Freedom Index

80. Since 2002, the organisation Reporters without Borders has assessed press freedom throughout the world, and has ranked countries accordingly in its "World Press Freedom Index".
81. The UK has been slipping down the ranking table for some time. Six years, the UK was ranked 28th in the Index. By 2017, the UK was ranked 40th in the Index¹².
82. According to Reporters without Borders, one of the reasons for the UK's press freedom decline in ranking is Section 40 of the Crime and Courts Act 2013 which is, as previously stated, the mirror image of clause 168 of the Bill. Section 40 is by no means the sole reason for this state affairs, as Reporters without Borders explains¹³:

A heavy-handed approach towards the press - often in the name of national security - has resulted in the UK slipping down the World Press Freedom Index. Parliament adopted the most extreme surveillance legislation in UK history, the Investigatory Powers Act, with insufficient protection mechanisms for whistleblowers, journalists, and their sources, posing a serious threat to investigative journalism. Even more alarming, the Law Commission's proposal for a new 'Espionage Act' would make it easy to classify journalists as 'spies' and jail them for up to 14 years for simply obtaining leaked information. Section 40 of the Crime and Courts Act 2013 remains cause for concern - in particular, the law's punitive cost-shifting measure that could hold publishers liable for the costs of all claims made against them, regardless of merit. The seizure by UK border authorities of a Syrian journalist's passport at the request of the Assad regime sent the worrying signal that critical foreign journalists traveling to the UK could be targeted by their own governments.

83. Reporters without Borders clearly considers security legislation and policy to be at the heart of the UK's declining Index ranking. Obviously, we do not comment on those issues. However, the mere fact that Section 40 was specifically identified as one of the contributory issues to the UK's ranking is significant. Presumably, were clauses 168 and 169 reinstated to the Bill and then enacted, the UK would fall still further in the ranking, notwithstanding the Government's recently announced commitment to repeal Section 40.

¹² <https://rsf.org/en/ranking>

¹³ <https://rsf.org/en/united-kingdom>

I. Conclusions

84. Clauses 168 and 169 of the Bill are fundamentally inimical to freedom of expression and natural justice. They are inconsistent with publishers' Article 6 and Article 10 Convention rights and, if reinstated into the Bill, could well result in unnecessary satellite litigation, and conceivably result in the closure of a number of publishing SMEs.
85. All Parliamentarians respect press freedom, and consider it to be of the greatest of importance. With the World Press Freedom Index holding Section 40 of the Crime and Courts Act 2013 to be a contributing factor to the UK's low press freedom ranking, reinstating clauses 168 and 169 into the Bill would appear to be inconsistent with the announced repeal of Section 40.
86. Accordingly, we urge Parliamentarians not to reinstate clauses 168 and 169 into the Bill.